

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

MICHAEL GARDNER,

Appellant.
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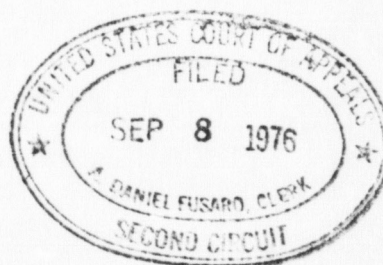
76-1339

APPENDIX TO BRIEF FOR
APPELLANT MICHAEL GARNDER

Appeal from A Judgment of
Conviction in The United
States District Court For
The Southern District of
New York

VOLUME IV

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Charge

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2 THE COURT: Mrs. Altbush, Ladies and Gentlemen
3 of the Jury, counsel for the government and counsel for
4 the defendants: my charge is somewhat lengthy. There
5 are at least five statutes which I must discuss, and even
6 some subdivisions of statutes. So somewhere about midway
7 through we will interrupt and take another breather.

8 Let me first thank all of you for what I
9 consider, and I think the attorneys consider, to be a
10 very conscientious service as jurors in this case.
11 There have been many documents introduced. You have
12 heard from many, many witnesses. We all know that this can
13 exact some toll. People who must sit for hours in a jury-
14 box and listen, watch -- you don't even have the advantage
15 which I have, which is to stand and pace back and forth
16 once in a while -- we know that this demands sacrifice
17 from you, aside from personal sacrifices. So we all
18 express our thanks to you for your diligent service, your
19 patient, conscientious service here as jurors. This is
20 important, as the attorneys have stated, because this is
21 a matter of great concern both to the government and to
22 each of the defendants here. This matter warrants the
23 attention that you have given to it up to this point.
24 I ask you to give me a similar amount of attention as I
25 undertake to instruct you as to the law which is applicable

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2 in this case.

3 Before doing that, I wish to thank the attorneys,
4 who, in my view, have demonstrated great professional
5 skill and competence and dedication with respect to their
6 respective clients in their respective positions.

7 First, I will point out some general principles
8 to you as to your duties, as to what you may and may not
9 consider during your deliberations. It is the Judge's
10 function to instruct you as to the law, the law which
11 is applicable in this case. It is your duty to accept
12 the law as I state it to you, and it is your duty to apply
13 the law to the facts as you find those facts to be during
14 your deliberations. I ask you not to single out any one
15 instruction alone as stating the law, but consider the
16 instructions as a whole. The logical result of your
17 application of the law to the facts which you find in this
18 case should be a verdict of guilty or a verdict of not
19 guilty with respect to the various counts with respect
20 to the defendants.

21 You are the sole and exclusive judges of the
22 facts in this case. You pass upon the weight of the
23 evidence; you determine the credibility of the witnesses;
24 you resolve such conflicts as there may be in the evidence;
25 you draw such reasonable inferences as may be warranted

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2 by the testimony and the exhibits in this case.

3 With respect to any matters of fact, it is
4 your recollection and yours alone which governs.
5 Anything that the attorneys for the government or for the
6 defendants may have said with respect to any matters in
7 evidence, or as to any factual matters, is not to be
8 substituted for your own independent recollection of the
9 evidence or the facts in this case. You are not to assume
10 that I have any opinion as to whether either defendant
11 is guilty or not guilty, or as to the truth or falsity
12 of the charges asserted in this indictment. The fact
13 that I have asked questions, denied motions, or granted
14 motions in the course of this trial is not to be taken
15 by you as an indication that either defendant is believed
16 by the Court to be guilty or not guilty. Further, counsel
17 have the right on the offer of certain evidence to press
18 legal objections, and in so doing they are simply per-
19 forming their duty.

20 In your deliberations to determine the facts
21 and whether the government has established the elements
22 of the crime charged, you are to consider solely the
23 testimony which you have heard from the witnesses, any
24 stipulations of fact that the lawyers have agreed upon,
25 any exhibits which have been received into evidence,

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2 including any tapes. You are to consider even any lack
3 of material evidence. But nothing else.

4 I have told you earlier in the trial that
5 certain evidence was being received subject to connection.
6 I have instructed you that with respect to certain of the
7 evidence I did not find it to be connected and that you are
8 not to consider it for any purpose. It has been stricken
9 as evidence. But I also instructed you that with
10 respect to certain other such evidence I have found that
11 it has been connected and thus it may be considered by you
12 along with all the other evidence in this case. Please
13 remember that this ruling does not in any way represent
14 a finding by this Court as to what the facts are - that
15 determination must be made by you, the jury. I have
16 simply ruled that the evidence in question may now be
17 considered by you as you perform your function of deciding
18 what the facts are.

19 You will recall that I have admitted certain
20 evidence of absent persons, such as acts and statements
21 of Miss Braunig. You may consider such evidence first
22 in determining whether such persons were participants in
23 any scheme charged in the indictment which you find to
24 exist.

25 Further, when people enter into a joint scheme

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to accomplish an unlawful end, they become agents for one another in carrying out the scheme. Hence, the acts or declarations of any one of them in the course of the scheme and in furtherance of the common purpose are deemed to be the acts of all, and all are responsible for such acts.

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Accordingly, if you find in accordance with these instructions that one or more of the schemes to defraud charged in the indictment existed, then acts done and statements and declarations made in furtherance of that scheme or schemes by any person found by you to have knowingly been a member of the scheme may be considered against any defendant that you find was also a member, even though such acts or declarations were made in the absence and without the knowledge of that defendant.

It is important to note that this principle applies only to the acts and declarations done or made during the continuance of the scheme and in furtherance of the scheme, that is, to carry out an unlawful objective or purpose of the scheme. It does not apply to acts or declarations which do not have each of these characteristics.

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The indictment in this case contains 13 counts. Michael Gardner is named as a defendant in each of the 13 counts. Sy Guthrie is named as a defendant in six of the counts. I will explain more about the structure of the

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2 indictment as we move along.

3 In the determination of whether a defendant is
4 guilty or not guilty of the crimes charged, you must
5 remember that guilt is personal and that the determination
6 of whether each defendant is guilty or not guilty must
7 be determined solely on the evidence admitted as to the
8 defendant you are considering. You are not to consider
9 evidence which was admitted solely as to one of the
10 defendants in determining whether the other defendant is
11 guilty or not guilty of the crimes charged.

12 As you approach the performance of your function
13 in this case, that is, the determination of whether each
14 defendant is guilty or not guilty, please remember that
15 it is your duty to weigh the evidence calmly and dis-
16 passionately, without sympathy or prejudice for or against
17 either party. The fact that the government is a party here
18 or that the prosecution occurs in the name of the United
19 States of America entitles it to no greater consideration
20 than that accorded to any other party to this case, and,
21 by the same token, it is entitled to no less consideration.
22 All parties, government and individuals alike, stand equal
23 before the law.

24 Each of the defendants on trial here has pleaded
25 not guilty to the counts with which he is charged. Con-

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2 sequently, if either defendant is to be convicted, the
3 government has the burden of proving each and every element
4 of the crimes charged against him beyond a reasonable
5 doubt. The burden of proving guilt beyond a reasonable
6 doubt never shifts: it remains upon the government throughout
7 the trial. The law never imposes on a defendant in a
8 criminal case the burden of calling any witness or
9 producing any evidence.

10 You may draw no unfavorable inference against
11 a defendant because he did not take the stand and testify.
12 In addition, you may not speculate as to why a defendant
13 chooses not to testify. Nor may you speculate as to
14 what a defendant might have stated had he chosen to testify.
15 In every criminal case there is a constitutional rule which
16 every defendant has a right to rely on: it is the rule that
17 no defendant is compelled to take the witness stand.
18 It is the prosecution which must prove a defendant guilty
19 as charged beyond a reasonable doubt. A defendant is not
20 required to disprove anything; he is not required to establish
21 his lack of guilt. Also, a defendant has no obligation to
22 call any witnesses on his own behalf or offer any evidence
23 whatsoever. In short, it is up to the government to
24 prove beyond a reasonable doubt every element of the
25 crimes charged in the indictment.

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2 Each defendant is presumed to be not guilty
3 of the accusations contained in the indictment and this
4 presumption continues throughout the trial, and even
5 during the course of your deliberations in the jury-
6 room. So, the presumption of innocence is sufficient to
7 acquit a defendant of a crime charged, unless it is over-
8 come by evidence that satisfies your mind beyond a reasonable
9 doubt of that defendant's guilt. Unless you are so satis-
10 fied as to either defendant, it is your sworn obligation
11 to find that defendant not guilty. If you are so satis-
12 fied as to either defendant, it is your sworn obligation
13 to find that defendant guilty.

14 And so the question arises, what is a reasonable
15 doubt? It is a doubt which a reasonable person has after
16 carefully weighing all the evidence, the kind of a doubt
17 which would make you hesitate to act in the most important
18 affairs of your own life. Reasonable doubt is a doubt
19 which appeals to your reason, your judgment, your common
20 sense, and your experience. It is not caprice, or whim,
21 or speculation; it is not an excuse to avoid the performance
22 of an unpleasant duty. Nor is it sympathy for any party.

23 If after a fair and impartial consideration
24 of all the evidence, or lack of evidence, you can honestly
25 say that you do not have an abiding belief as to a defendant's

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2 guilt, then you have a reasonable doubt, and it is your
3 duty to acquit the defendant you are considering. On
4 the other hand, if after a fair and impartial consideration
5 of all the evidence you can honestly say that you do have
6 an abiding belief as to a defendant's guilt, then you have
7 no reasonable doubt, and it is your duty to convict the
8 defendant you are considering.

9 A reasonable doubt does not mean positive
10 certainty beyond all possible doubt. The law in a criminal
11 case is that it is sufficient if the guilt of a defendant
12 is established beyond a reasonable doubt, not beyond all
13 possible doubt.

14 From time to time you may have heard reference
15 made to direct evidence and to circumstantial evidence.
16 Let me explain the difference between the two.

17 Direct evidence is where a witness testifies
18 to what he saw, heard or observed, what he knows of his
19 own knowledge, something which comes to him by virtue of
20 his senses. That is direct evidence.

21 Circumstantial evidence is evidence of facts
22 and circumstances from which one may infer connected facts
23 which reasonably follow in the common experience of man-
24 kind. Stated somewhat differently, circumstantial
25 evidence is a fact or a series of facts in evidence which

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2 have a logical tendency to lead the mind to a conclusion
3 that another fact exists, even though there is no direct
4 evidence to that effect.

5 Let me give you a brief example. If when you
6 filed out during a recess all of the windows in this
7 courtroom were closed and all the window sills beneath
8 them were dry, and then, after a 10 or 15-minute recess
9 you returned to the courtroom and all of the windows were
10 still closed, but as you looked out you saw that it was
11 raining, whereas previously it had not been, and if you
12 saw that there was water on those sills upon your return,
13 you could conclude that someone had opened the windows
14 and that the rain had come into the courtroom and fallen
15 upon the sills. Now, you would arrive at this conclusion
16 from circumstantial evidence. In other words, you would
17 infer on the basis of reason and experience from one or
18 more established facts, the existence of some further
19 fact.

3 20 A conviction may not rest upon suspicious
21 circumstances alone. However, circumstantial evidence,
22 if believed, is of no less value than direct evidence,
23 for in either case you must be convinced beyond a reasonable
24 doubt of the guilt of the defendant you are considering.

25 There are times when different inferences may

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2 be drawn from the same facts, whether proved by direct or by
3 circumstantial evidence. The government asks you to draw
4 one set of inferences, a defendant asks you to draw another.

5 It is for you, and you alone, to decide what
6 reasonable inferences you choose to draw from the evidence
7 in this case. Indeed, it is your duty to determine the
8 reasonable inferences to be drawn from the facts as you
9 find those facts to be from the evidence. But you may not
10 indulge in guesswork or speculation.

11 Now, there are a number of factors which are not
12 evidence in this case and which you may not, under any
13 circumstances, consider during your deliberations. Let
14 me say that a question put to a witness is never evidence;
15 it is only the answer which is evidence. Further, if
16 during the course of the trial a question was asked and
17 an objection was interposed, and I sustained the objection,
18 you are to disregard the question and any alleged facts
19 contained in the question. If there was an answer to the
20 question, you are also to disregard the answer.

21 Similarly, if I ruled that an answer be stricken from the
22 record, you are to disregard the answer and the question
23 in your deliberations. They are not evidence and,
24 therefore, cannot be considered by you in any respect.

25 Also, as I told you at the beginning of this

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2 trial, an indictment is not evidence. It is simply a
3 procedure by which persons accused by a grand jury of
4 crimes are brought to trial. Whether a person so
5 accused is guilty or not guilty of the crimes charged is
6 determined by a trial jury, such as you.

7 In addition, during this trial you have heard
8 testimony from the defendant Gardner that he is presently
9 incarcerated and has been incarcerated since May of 1975.
10 I instruct you in this regard the primary reason for Mr.
11 Gardner's present incarceration is not related to the
12 charges in this case and that his incarceration is not to
13 be considered by you for any purpose in considering the
14 evidence in this case or in your deliberations.

15 Also, there is another person, Susan Braunig,
16 named in the indictment who is not on trial here. You
17 are not to consider her absence as evidence of any kind
18 for any purpose. She may be absent for a variety of
19 reasons, and the disposition of the indictment with respect
20 to her is of no concern to you as jurors. You are not
21 to speculate as to the reason why she is not on trial here.

22 Lastly, I shall tell you that, as you are well
23 aware, there have been several occasions during the course
24 of this case for the lawyers to confer with the Court out
25 of your hearing. You are not to speculate as to what was

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2 being discussed. Such conferences have been held at the
3 bench to avoid you listening to arguments on questions
4 of law, which concerned only counsel and the Court.

5 Certain of the evidence in this trial was
6 admitted by way of tape recordings of certain alleged
7 conversations. I instruct you that evidence admitted
8 by means of tape recordings is entitled to no greater
9 and no less weight than evidence admitted by any other
10 means.

11 Now, during the course of the trial you were
12 given transcripts of the tape recordings as an aid to your
13 hearing of the evidence on the tapes. The tapes are
14 evidence in this case; the transcripts, except for those
15 few admitted into evidence, are not. They were only
16 to aid you in your hearing of the tapes. Therefore, if the
17 transcripts appeared to you to vary from the tapes in any
18 respect, it is your hearing of the tapes that governs.
19 You, the jury, must determine as the trier of the facts,
20 what was said in the conversations for which tape
21 recordings were offered into evidence.

22 You, as jurors, are the sole judges of the
23 credibility of the witnesses and the weight their testimony
24 deserves. You know, of course, that there is no automatic
25 way to decide who is telling the truth and who is not.

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2 Credibility can be equated with believability. If a witness
3 is credible you say he or she is believable.

4 You should carefully scrutinize all the testimony
5 given, both on direct and cross-examination, the circum-
6 stances under which each witness has testified, and
7 every matter in evidence which tends to show whether a
8 witness is worthy of belief. Consider the witness's
9 ability to observe the matters as to which he or she has
10 testified, and whether the witness impresses you as having
11 had an accurate recollection of these matters.

12 A witness may be discredited or impeached by con-
13 tradictory evidence, or by evidence that at other times
14 the witness made statements inconsistent with the witness's
15 present testimony. If you believe that any witness has
16 been impeached and thus discredited, it is your exclusive
17 province to give the testimony of that witness such
18 credibility, if any, as you may think it deserves.

19 When judging credibility, consider any relation
20 any witness may bear to any side of the case, the manner
21 in which each witness might be affected by the verdict,
22 and the extent to which, if at all, each witness is either
23 supported or contradicted by other evidence in the case.
24 If you find that any witness has wilfully testified falsely
25 as to any material matter, you may reject the entire testi-

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2 mony of the witness, or you may accept such portion of it
3 as you believe to be true.

4 In this case the defendant Gardner has taken
5 the stand. There is no compulsion or obligation upon a
6 defendant to testify, as I have said. Bu- when a defendant
7 does take the stand and does testify, he is tested by all the
8 same rules and guides that any other witness is tested by.

9 You know, of course, that a defendant is interested,
10 vitally interested, in the outcome of the case. Interest
11 is a factor that you must take into consideration when
12 assessing the testimony of any witness, whether presented
13 by the government or the defense. In this regard, let me
14 note that there has been evidence in this case of the
15 defendant Gardner's prior convictions. With reference to
16 this, I charge you that such evidence is not to be con-
17 sidered by you as evidence of a criminal character on the
18 part of the defendant, or as evidence of a disposition to
19 commit the crimes charged in the indictment here. Th
20 evidence may be considered by the jury insofar as it may
21 affect the credibility of the defendant as a witness.

22 Further, you may consider this evidence as bearing on the
23 question of whether or not the defendant Gardner attempted
24 to mislead Ross Allen with respect to these matters in
25 issue.

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The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education and experience have become expert in some science, profession or calling may state their opinions as to relevant and material matter in which they profess to be expert and may also state their reasons for the opinion.

In this case, one witness, Donald Stangel, was presented by the government as a handwriting expert. Your role in adjudging credibility applies to experts as well as to any other witness. You should consider the expert opinion received in evidence in this case and give it as much or as little weight as you think it deserves. If you should decide that the opinion of an expert is not based upon sufficient education or experience or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence or that the trustworthiness of the expert or his credibility is questionable for some other reason, including the reason of relationship to one party or the other, then you may disregard the opinion entirely.

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2 If it is specially within the power of the
3 prosecution or defense to produce a witness who could
4 give material testimony on an issue or to produce
5 other evidence, the failure to call the witness may
6 give rise to an inference that the evidence would be
7 unfavorable. You cannot draw any such inference with
8 regard to a witness or an exhibit that is equally
9 available to both parties, or where the witness' testi-
10 mony would be merely cumulative.

11 I remind you again that a defendant is
12 under no obligation to offer any evidence whatsoever.

13 With regard to all witnesses, the ultimate
14 question for you to decide in passing on the credibility
15 of a witness is did the witness tell the truth before
16 you. It is for you to say whether a witness' testi-
17 mony at this trial was truthful or untruthful in whole
18 or in part.

19 Now, this completes my general instruc-
20 tions with regard to what your duty and function is
21 and with regard to what you may or may not consider
22 in your deliberations. I am going to turn now to
23 a discussion of the specific charges against the de-
24 fendants and instruct you as to what essential elements
25 the government must prove beyond a reasonable doubt

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2 in order to sustain the charges against each defend-
3 ant.

4 Let me first briefly discuss the structure
5 of the indictment. It is a lengthy indictment.
6 So first I am going to discuss the structure of the
7 indictment. Then I am going to read a number of
8 pages from the indictment and, where I can, summarize
9 some of the counts. Following that, if you wish,
10 we can take a break.

11 The indictment is in several parts.
12 The first part is an introduction. It is characterized
13 as an introduction.

14 This describes in general terms the structure
15 of various transactions which the government alleges
16 were schemes and artifices to defraud devised by one
17 or more of the defendants together with others in order
18 to defraud or falsely obtain money from various per-
19 sons or businesses. The introduction describes some
20 of these transactions as advance fee schemes, certain
21 of which are charged against both the defendants and cer-
22 tain of which are charged against the defendant Gardner
23 only. It describes other of the transactions
24 which are charged against the defendant Gardner only as
25 fraudulent bank schemes and as a fictitious names and

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2 titles scheme.

3 The second part of the indictment con-
4 sists of 12 so-called fraud counts. As I have told you
5 before, the defendant Gardner is charged in each of
6 these counts. The defendant Guthrie is charged as
7 a co-defendant in six of the counts. The crime
8 charged in each count is doing an act or causing or
9 aiding and abetting someone else to do an act such as
10 using interstate wire facilities, using the mail or
11 inducing travel in interstate commerce in order to
12 execute one of the alleged unlawful schemes to defraud.

13 And the third part of the indictment con-
14 sists of the so-called fictitious names and titles
15 count, count 13.

16 In this count, the defendant Gardner is
17 charged with having used or having aided and abetted
18 Miss Braunig in the use of fictitious names and titles
19 in furtherance of the alleged unlawful mail or wire
20 fraud schemes charged in earlier counts and in further-
21 ance of an alleged unlawful scheme to defraud retail
22 stores, banks and other commercial enterprises.

23 With regard to each of the crimes charged,
24 I will separately discuss with you the elements which must
25 be proved by the government beyond a reasonable doubt

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2 before either defendant may be found guilty on any
3 count. Before doing so, however, I am going to
4 partially read and partially summarize the indict-
5 ment for you.

6 Now, you may very well have some difficulty
7 in remembering the precise wording of these counts,
8 or some of these summaries of counts, so I plan to
9 send into the jury room, once you commence your de-
10 liberations, a copy of the indictment.

11 Please remember that an indictment is not
12 evidence. An indictment is a method or a procedure
13 whereby persons are accused of crimes by a grand jury,
14 but it is not evidence.

15 The United States of America vs. Michael S.
16 Gardner, also known as S. Michael Gardner and as S. M.
17 Gardner, Susan M. Braunig, also known as Mrs. Susan
18 M. Gardner and as S. M. Gardner, and Sy Yoakum Guthrie,
19 III, defendants.

20 I am going to read counts 1 through 12,
21 read or summarize, and we will later summarize count
22 13 at a later point.

23 "Introduction.

24 "The Grand Jury charges:

25 "From in and around December, 1973 up to

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and including the date of the filing of this Indictment" -- and I think it would be agreed that that occurred January 9, 1976 -- "in the Southern District of New York and elsewhere, MICHAEL S. GARDNER (also known as S. Michael Gardner and as S. M. Gardner, and hereinafter called 'GARDNER') and SUSAN M. BRAUNIG (also known as Mrs. Susan M. Gardner and as S. M. Gardner, and hereinafter called 'BRAUNIG'), defendants, together with SY YOAKUM GUTHRIE III (hereinafter called 'GUTHRIE'), defendant in Counts 7 through 12 of this indictment, and also together with others known and unknown to the Grand Jury (hereinafter called 'confederates'), unlawfully, wilfully and knowingly did devise and intend to devise schemes and artifices to defraud and to obtain money and property from victims such as Arthur White and White Holdings Ltd. (Counts 1 and 4), L. Ross Allen and Porklean Farms Ltd. (Counts 2, 3 and 4), Barclay's Bank of New York (Counts 5 and 6), Fun Tyme Packages Inc. (Counts 7 and 8), Myrtle Rupe (Counts 9, 10, 11 and 12), and retail stores, banks, and other commercial enterprises (Count 13) by means of false and fraudulent pretenses, representations and promises in the form of 'advance fee' schemes and related schemes also involving false and fictitious names and titles

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2 and false, forged and spurious checks, instruments,
3 and obligations.

4 " (A) It was part and pattern of the ad-
5 vance fee schemes and artifices to defraud that:

6 "GUTHRIE" -- who I might parenthetically
7 note is charged only in connection with the Fun Tyme
8 and Rupe matters -- "and other confederates would
9 bring victims, in the form of persons and businesses
10 in need of rapid and substantial financial assistance,
11 to GARDNER, who would be introduced as an international
12 financial consultant having ready access to large-scale
13 financing from major foreign and domestic sources.
14 GARDNER, purporting to act as the 'agent' of undisclosed
15 principals or in the name of companies such as Ekalo
16 Investments Inc. and Penguin Products Company (which
17 were actually mere shells), would promise to obtain
18 rapidly for the victims major loans, letters of credit,
19 permanent refinancing, or other forms of financial
20 assistance from, through, or by means of major insur-
21 ance companies, Swiss banks, Canadian, German and
22 Panamanian corporations, European exchanges, and such
23 entities. In return for such financial assistance,
24 which the defendants and their confederates repeatedly
25 assured the victims would be immediately forthcoming,

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2 the victims were required to make certain payments,
3 of which thousands of dollars were required to be paid
4 in advance. These advance fees, ranging from \$5,000
5 to \$25,000 and more, were required to be paid to GARDNER
6 in the form of certified checks or other readily
7 negotiable instruments.

8 "GARDNER, BRAUNIG, GUTHRIE and their con-
9 federates had no honest expectation that the promised
10 financial assistance would or could be obtained and
11 had neither the capacity nor the intention to obtain
12 it. Rather, the advance fees were immediately cashed
13 or deposited into various personal bank accounts, in-
14 cluding accounts opened by BRAUNIG falsely posing as
15 GARDNER's wife, and the proceeds were then immediately
16 spent on primarily personal uses, including payments
17 secretly funneled by GARDNER to the benefit of GUTHRIE
18 and other confederates as their shares of the proceeds
19 of the fraudulent schemes.

20 "Thereafter, GARDNER, BRAUNIG, GUTHRIE,
21 and their confederates, having spent the advance fees,
22 put off the demands of the victims by avoiding meeting
23 or talking with them whenever possible, by claiming
24 that there had been unavoidable or unforeseeable delays
25 or that further monies were needed to meet unfore-

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2 seen expenses, and by employing other such ruses to
3 cover their fraud. In the end, GARDNER, BRAUNIG,
4 GUTHRIE, and their confederates never delivered any
5 of the promised financial assistance and never returned
6 any of the advance fees, but claimed instead that the
7 deals had broken down because of some noncompliance,
8 misrepresentation or failing on the part of the victims
9 or of third parties that also precluded any repayment
10 of the advance fees.

11 "As GARDNER, BRAUNIG, GUTHRIE and their
12 confederates well knew, their aforesaid pretenses,
13 representations, and promises were false and fraudulent
14 confidence schemes intentionally designed to defraud
15 the victims of their advance fees and to conceal the
16 fraud.

17 "(B) It was part and pattern of the
18 related schemes and artifices to defraud involving false,
19 forged and spurious checks, instruments and obligations
20 that:

21 "GARDNER and BRAUNIG, with the aid of their
22 confederates, would open accounts in both individual and
23 corporate names (such as the fictitious name S. M.
24 Gardner and the fraudulent enterprise Ekalb Investments,
25 Inc.) at the Metropolitan Trust Company in Canada and

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2 the Barclay's Bank of New York, and would acquire
3 blank checks, instruments, and obligations (collec-
4 tively referred to as 'instruments') of said
5 institutions and gain access to their services and
6 facilities, which they would use for the commission
7 of frauds upon said institutions.

8 "Among other frauds, GARDNER would falsely
9 and fraudulently complete the front sides of instru-
10 ments of the Metropolitan Trust Company, using false,
11 fictitious, forged and spurious account numbers, account
12 names, and signacures, and making said instruments pay-
13 able to the defendant BRAUNIG, who would then endorse
14 these instruments on their backs and deposit them into
15 an account in her own name at Barclay's Bank of New
16 York. Thereafter, BRAUNIG, taking advantage of the
17 extended delay foreseeable in the use of the inter-
18 national mails by Barclay's Bank and its agents in the
19 clearing and collection of these instruments, would
20 fraudulently urge Barclay's Bank to credit her account
21 with the face amounts of said instruments and would
22 withdraw these amounts from her account prior to the
23 time that Barclay Bank learned that these instruments
24 were false and spurious.

25 "(C) It was part and pattern of the related

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2 schemes and artifices to defraud involving false and
3 fictitious names and titles that:

4 "MICHAEL S. GARDNER having assumed the name
5 'S. Michael Gardner', SUSAN M. BRAUNIG would falsely
6 and fraudulently assume the name of 'Susan M. Gardner',
7 and both would fraudulently assume the name 'S. M. Gardner.'
8 Further, GARDNER would falsely pose as an international
9 financial consultant having ready access to large-scale
10 financing, and BRAUNIG would falsely and fraudulently
11 pose as GARDNER's wife, secretary, administrative
12 assistant, business partner, and the like, as the occa-
13 sion demanded, and would assume falsely and fraudulently
14 such titles as 'Mrs.', 'Office Manager,' 'Administrative
15 Assistant to President,' and the like. By the use
16 and with the aid of these assumed names and titles and
17 the illusion of substance and respectability thereby
18 created, GARDNER and BRAUNIG not only conducted, pro-
19 moted, and carried on the advance fees schemes and
20 false instrument schemes hereinabove described but also
21 fraudulently arranged for the extension of credit from
22 retail stores, banks, and other commercial enterprises,
23 for the purpose of defrauding them and of conducting
24 other unlawful business.

25 "Counts One Through Four.

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2 "The Grand Jury further charges" --

3 and here I am summarizing for you -- the defendants
4 Gardner and Braunig, for the purpose of executing the
5 schemes alleged in the instruction -- and here I am
6 referring to counts 1 through 4 -- in particular the
7 advance fee schemes relating to Arthur White, White
8 Holdings, L. Ross Allen and Porklean Farms Ltd., caused
9 a letter from Penguin Products to L. Ross Allen to be
10 placed in the mails in violation of the mail fraud
11 statute, caused certain telephone calls from Gardner
12 in New York to Allen in Canada and between Gardner and
13 Braunig in New York and Allen in Canada to be made
14 in violation of the wire fraud statute, and transported
15 a \$25,000 check from White from Canada to New York
16 in violation of the travel fraud statute.

17 The indictment itself will give you the
18 detailed charges.

19 Moving to counts 5 and 6, which I have
20 undertaken to summarize, the defendants Gardner and
21 Braunig, for the purpose of executing in particular
22 the scheme relating to defrauding of Barclays Bank of
23 New York by means of false, forged and spurious checks,
24 caused Barclays Bank of New York and its agents to
25 send through the mails for collection two fraudulent

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2 checks, Government's Exhibits 56A and 56B in evi-
3 dence, in violation of the federal mail fraud statute.

4 Counts 7 and 8 -- again I am summarizing --
5 the grand jury charges the defendants Gardner, Braunig
6 and Guthrie, for the purpose of executing in particu-
7 lar the advance fee scheme relating to Fun Tyme
8 Packages, Inc., did cause a particular letter from
9 Gardner to Mark Parker in Mineola to be placed in the
10 mails in violation of the federal mail fraud statute
11 and did cause a cable from Mr. Vigevani in Switzerland
12 to be sent by wire to the Bank of New York in New
13 York in violation of the federal wire fraud statute.

14 And counts 9 through 12, which I am summarizing,
15 the defendants Gardner, Braunig and Guthrie, for the
16 purpose of executing in particular the advance fee
17 scheme relating to Myrtle Rupe, caused two telephone
18 conversations between Gardner in New York and Rupe in
19 Oklahoma City, one telephone conversation between Guthrie
20 in New York and Rupe in Oklahoma City, to be
21 transmitted in violation of the federal wire fraud
22 statute and caused or induced Myrtle Rupe to travel
23 in interstate commerce in connection with a scheme to
24 defraud her of \$5000 or more in violation of the
25 federal travel fraud statute.

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2 I am going to summarize count 13 briefly
3 a little bit later.

4 As I have told you, the indictment will
5 be made available to you to take into the jury room
6 when you begin your deliberations.

7 Why don't we interrupt here and take a few
8 minutes' break and then we will resume and finish.
9 Don't talk about the case, please.

10 Lead the jury out.

11 (The jury left the courtroom.)
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(Jury in box.)

THE COURT: I am going to turn first to that portion of the indictment which contains the 12 counts that charge violations of Federal anti-fraud statutes, that is, laws passed by Congress which are generally referred to as the mail fraud, the wire fraud and the travel fraud statutes. The introductory wording of these statutes as they pertain to all but the first of these counts, which I will deal with later, is identical and reads:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises ..."

And then from that point on the statutes differ. One statute in pertinent part continues by making it a crime when any person:

"for the purpose of executing such scheme or artifice, or attempting to do so, places in any post office or authorized depository for mail, matter ... to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter ... or knowingly causes to be delivered

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by mail ... any such matter ..."

This is the mail fraud statute. In short, the use of the mails in furtherance of a fraudulent scheme is prohibited.

A separate statute, using the same introductory language as to a scheme or artifice to defraud, makes it a criminal offense when one:

"... transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, and writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice."

This is the wire fraud statute, and the language referred to extends generally to the interstate or foreign use of such facilities as telephones, telegrams and cables.

And still another statute with respect to such fraudulent schemes makes it a criminal offense when anyone:

"Transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of \$5000 or more."

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This is the travel fraud statute.

The indictment charges violations of each of these statutes, depending upon whether it involves the use of the mails, telephone, telegrams, cables or travel in the alleged execution or furtherance of a scheme to defraud.

Another Federal statute also comes into play, known as the Aiding and Abetting Law, which provides that a person who "aids, abets, counsels, commands, induces or procures the commission of any offense against the United States is equally punishable as the person who commits the offense."

Under the aiding and abetting law, a person who wilfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable just as if he himself did the act.

Later I shall instruct you as to this law in more detail.

In short, the crime with which the defendant Gardner is charged in each of the first 12 counts of the indictment, and with which the defendant Guthrie is charged in each of Counts 7 through 12 of the indictment, involves doing an act or causing or abetting or aiding someone else

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2 to do an act, such as using the mails or interstate
3 wire facilities, or travelling in interstate commerce,
4 in order to execute one of the schemes to defraud out-
5 lined in the Introduction in the indictment. Please keep
6 in mind that the offense charged against the defendant
7 Gardner in Count 1 is somewhat different from the other
8 counts. I will have a brief word on that. Now, the
9 mail fraud, wire fraud and travel fraud statutes contain
10 the same elements, except, of course, the mail fraud
11 statute involves the use of the mails, the wire fraud
12 statute involves interstate or international use of
13 telephone, telegrams, or cables, and the travel statute
14 involves interstate travel by a victim, all in execution
15 or furtherance of the alleged scheme to defraud. In
16 order to find that either the defendant violated the mail
17 fraud, wire fraud or travel fraud statutes in connection
18 with the particular counts in which he is charged, the
19 government must prove beyond a reasonable doubt the
20 following essential elements:

21 One, that a scheme or artifice to defraud or
22 to obtain money by false and fraudulent pretenses,
23 representations or promises, as alleged in the indictment,
24 existed.

25 Two, that the defendant you are considering

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2 knowingly and wilfully participated in the scheme or
3 artifice to defraud, with knowledge of its fraudulent
4 nature and with intent to defraud; and

5 Three, that as to each count the defendant
6 you are considering either used or caused the use of the
7 mails, or the use of interstate or international wire
8 facilities, or the interstate travel by a victim specified
9 in the particular count, in execution or furtherance of
10 the scheme charged in connection with the particular count
11 you are considering.

12 Let us consider each element separately.

13 The first element: scheme or artifice to
14 defraud --

15 The first element of the offense charged in
16 each of the fraud counts is the existence of a scheme or
17 artifice to defraud. A "scheme or artifice" is a plan
18 for the accomplishment of an object. A scheme or artifice
19 to defraud is any plan, device or course of action intended
20 to deceive others and to obtain money or property from
21 such persons by means of false or fraudulent pretenses,
22 representations or promises calculated to deceive persons
23 of average prudence and comprehension.

24 A statement, representation, claim or document
25 is false or fraudulent if it was material and if it was

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untrue when made and the person making it or causing it
to be made knew it to be untrue or deliberately blinded
himself to the knowledge that it was false, and if it
was made or caused to be made with the intent to deceive.

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2 Now, the fraud prohibited by the statute is not
3 limited to active misrepresentation. A fraudulent scheme
4 may exist although no express misrepresentation or fact is made.
5 The deceitful concealment of material fact or the deceitful
6 representation of half truths may also constitute an actual
7 fraud, and the devising of a scheme for obtaining money or
8 property by such half truths or concealment or by creating a
9 false impression is in violation of the statutes. If there
10 is deception, the manner in which it is accomplished is im-
11 material.

12 I instructed that the law does not require that
13 the government prove all the pretenses, misrepresentations or
14 concealments charged in the indictment. It is sufficient
15 as to any count if the government proves beyond a reasonable
16 doubt that at least one pretense, misrepresentation or conceal-
17 ment of material fact was made in furtherance of a scheme to
18 defraud as charged in that count. However, you must be
19 persuaded beyond a reasonable doubt of the actual existence
20 of the scheme or artifice to defraud which is charged.

21 In this regard, I charge you that it is not necessary
22 that you find that any scheme actually succeeded, or that a
23 defendant realized any gain at all from any scheme. Nor is
24 it necessary for the government to establish that the victim
25 suffered any loss.

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2 The crime charged is the scheme, and not the
3 result of the scheme.

4 Likewise, since the devising of a scheme or
5 artifice concerns a defendant's conduct and intent, should
6 you find that, as charged, a scheme to defraud existed, it
7 is no defense that the victims themselves may have made in-
8 accurate representations or entered into agreements that they
9 could not fulfill.

10 The second element that the government must prove
11 beyond a reasonable doubt as to each of the fraud counts
12 in order to convict a defendant is that the defendant you
13 are considering participated in the scheme or artifice to
14 defraud charged in connection with that count, that he became
15 a party to it knowingly, willfully and with intent to defraud.

16 "Knowingly" means to act purposely and deliberately,
17 rather than through mistake, inadvertence or other innocent
18 reason.

19 "Willfully" means to act voluntarily and inten-
20 tionally, and with specific intent to do something the law
21 forbids, that is to say, to act with the purpose either of
22 disobeying or disregarding the law.

23 "Intent to defraud" means to act knowingly and
24 with the specific intent to deceive for the purpose of either
25 causing some financial loss to another and/or bringing about

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financial gain to one's self.

Fraudulent intent is one of the essential elements of the offenses with which the defendants are charged.

Fraudulent intent is not presumed or assumed; it is personal and not imputed. One is chargeable with his own personal intent, not the intent of some other person. Good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element. One who acts with honest intention is not chargeable with fraudulent intent. One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent, even though such opinion is erroneous and such belief is a mistaken belief. Evidence which establishes only that a person has made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent. In order to establish fraudulent intent on the part of the person, it must be established by the government that such person knowingly and intentionally attempted to deceive another.

At the same time, it is no defense that a defendant, knowing that his representations were false or that his actions were fraudulent, spoke or acted out of a belief that ultimately everything would work out so that no one would suffer any monetary loss. Nor is it a defense that

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2 a defendant first made his representations in good faith if
3 later; at any time charged within the period covered by the
4 indictment, he realized the representations were false, yet
5 deliberately continue to make them.

6 However, if you should find that at the time a
7 representation was made it was then true and correct, the
8 mere fact that thereafter circumstances changed, making that
9 representation later untrue, would not warrant a verdict of
10 guilty.

11 In order to sustain the charges against a defen-
12 dant, the government must establish beyond a reasonable
13 doubt that the defendant you are considering knew that his
14 conduct as a participant in the scheme was calculated to
15 deceive potential victims, and nonetheless he willfully
16 associated himself with an alleged fraudulent scheme with a
17 specific intent to defraud. If you find that with respect
18 to any count charged a defendant did not act with a specific
19 intent to defraud, then you may not convict that defendant
20 as to that count, regardless of whether you approve or
21 disapprove of any other motive or the actions of that defen-
22 dant.

23 You may find that a defendant had actual knowledge
24 of falsity of statements alleged to have been misrepresenta-
25 tions if you find beyond a reasonable doubt that the defendant

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2 you are considering acted with a deliberate disregard of
3 whether the statements were true or false and with a con-
4 scious purpose to avoid learning the truth. However, as
5 I have charged you, mere knowledge of another's plans to
6 defraud is not sufficient to convict either defendant, if
7 you do not find beyond a reasonable doubt that the defendant
8 you are considering himself intended to defraud.

9 Also, mere association with others involved in
10 such a scheme does not establish that a defendant himself
11 participated in the scheme.

12 There has been some discussion in this case of the
13 role of a "finder." "Finder" is a term that is often used
14 synonymously with "broker." A finder can be a person who
15 brings parties to a financial or commercial transaction
16 together and receives a fee for doing so. There is nothing
17 illegal or improper, per se, about a person working as a
18 finder in the financial world.

19 Now, in determining whether either defendant
20 knowingly and willfully and with the intent to defraud
21 committed the offenses with which he is charged, issues of
22 fact are presented, and clearly these issues concern what is
23 in one's mind.

24 It has been stated frequently that you bring into
25 the jurybox the common sense and the experience of your daily

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2 lives. Obviously, it is not always possible to ascertain or
3 prove directly the operation of the mind, or the intention of
4 a defendant. You cannot look into his mind to see what his
5 intentions were, but you are able to consider all the facts
6 and circumstances shown by the evidence and exhibits in
7 this case, and to draw your own conclusions with a reasonable
8 degree of accuracy as to what, if anything, the intentions
9 of either of the defendants were.

10 Intent involves a mental attitude. From evidence
11 of particular actions coupled with evidence of surrounding
12 circumstances, one may choose to draw certain conclusions.
13 In other words, proof of the circumstances surrounding a
14 person's actions, if found to exist, can supply an adequate
15 basis for finding that a defendant acted knowingly and
16 willfully.

17 While I am discussing this issue of a defendant's
18 intent or state of mind, let me remind you that there was
19 certain evidence which was admitted during the trial as
20 bearing on the issue of intent with respect to one or the
21 other of the defendants. Let me discuss that evidence with
22 you now.

23 You have heard evidence which may lead you to
24 believe that the defendant Gardner was involved in one or
25 more alleged incidents and that the defendant Guthrie was

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2 involved in one alleged incident, which incidents are said
3 by the government to be similar to the acts with which each
4 of these defendants is charged in the indictment in this case.

5 The evidence of this type relating to the defendant
6 Gardner is that relating to the alleged World Wide Securities
7 matter and the arrest of Susan Braunig in Canada in connec-
8 tion with certain fraudulent check charges. The evidence of
9 this type relating to the defendant Guthrie is regarding
10 dealings he had with a man named Edward Fucillo.

11 It is for you, the jury, in considering this
12 evidence, to determine whether it shows misconduct on the
13 part of the defendant alleged to have been involved and
14 whether it is evidence of an act or acts similar to the acts
15 charged here. I instruct you, however, that this evidence
16 is not to be considered by you in determining whether either
17 defendant committed the acts charged in the indictment in
18 this case or for any other purpose, unless you first find
19 that the other evidence which you have heard standing alone
20 establishes beyond a reasonable doubt that the defendant
21 you are considering committed the acts charged in this
22 indictment. If you find beyond a reasonable doubt, based
23 solely on the evidence other than the alleged similar act or
24 acts, that either defendant did commit the acts charged in
25 the indictment, then you may consider evidence of the alleged

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2 similar act or acts of that defendant to whatever extent you
3 wish in determining the state of mind, motive, or intent
4 with which the defendant you are considering did the acts in
5 this case which you have found to have occurred. If you
6 find that a similar act has been established by the govern-
7 ment as to either defendant, then you may draw an inference,
8 though you are under no obligation to do so, that in doing
9 the acts charged in the indictment the defendant you are
10 considering acted in this case knowingly and intentionally,
11 and not because of mistake or accident or other innocent
12 reason.

13 In no event are you to consider this evidence as
14 bearing on the character or disposition of either defendant.
15 I remind you also that you are not to consider any similar
16 act which you find to have been established as to one defen-
17 dant as evidence against the other defendant for any purpose.

18 Now, the government has also offered certain
19 evidence against the defendant Guthrie, which it contends
20 is evidence that the defendant made false exculpatory state-
21 ments when questioned by the grand jury. If you find that
22 when questioned by the grand jury the defendant Guthrie gave
23 false statements in an attempt to exonerate himself, you may
24 consider such statements as circumstantial evidence from
25 which consciousness of guilt or criminal intent may be

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2 inferred. Whether or not the evidence of the defendant
3 Guthrie's statements points to a consciousness of guilt, the
4 significance, if any, to be attached to any such evidence are
5 matters for your determination. I caution you that evidence
6 of such statements by the defendant Guthrie, should you find
7 them to have been made, is binding only on the defendant who
8 actually made the statements, and any such statement cannot
9 be considered by you for any purpose as against the defendant
10 Gardner.

11 To conclude on the second element, knowledge of
12 falsity and a specific intent to defraud or deceive on the
13 part of the defendant you are considering is an essential
14 element of the crimes charged in the first 12 counts of the
15 indictment. Accordingly, if you find that a defendant
16 lacked such knowledge and intent, or that he acted in good
17 faith, this would be a defense, and you should acquit that
18 defendant.

19 If you find that the government has established
20 beyond a reasonable doubt not only the first element, that
21 there was a scheme to defraud, that also the second element,
22 that a defendant was a knowing participant in such a scheme
23 and acted with a specific intent to defraud, then you must
24 go on and consider whether the government has also estab-
25 lished the third element, as to which I am about to instruct

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2 you, in order to determine whether you have a sufficient
3 basis upon which to convict that defendant as to the count
4 you are considering.

5 The third element which the government must prove
6 beyond a reasonable doubt as to each of the first 12 counts
7 is sometimes called the jurisdictional element. This differs
8 as to each of the three statutes involved in these 12 counts.
9 I will instruct you separately on this third element under
10 the mail fraud, wire fraud, and travel fraud statutes.

11 First, as to the mail counts, counts 2, 5, 6
12 charged against the defendant Gardner, and count 7 charged
13 against both defendants:

14 Before a defendant may be found guilty as to these
15 counts, the government must also prove beyond a reasonable
16 doubt that in furtherance of the scheme to defraud, the
17 defendant you are considering did use the mails or cause the
18 mails to be used in connection with the matter referred to
19 in the particular counts you may be considering.

20 Unlike the case of wire fraud, which I will discuss
21 in a minute, it is not necessary to show that the mail travel
22 in interstate or foreign commerce.

23 Here, the counts in question -- counts 2, 5, 6
24 and 7-- refer to letters which, the government contends,
25 was sent through the mails from New York to, respectively,

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2 St. Catherines, Toronto, Montreal and Mineola in furtherance
3 of the alleged schemes set forth in the respective counts.

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4 Where one does an act with knowledge that the use
5 of the mails will follow in the ordinary course of business,
6 or where such use of the mails can reasonably be foreseen
7 even though not actually intended, then he causes the mails
8 to be used. Thus, while use of the mails in furtherance of
9 a scheme to defraud is an essential element of the mail
10 fraud charges, it is not necessary to show that the defendant
11 in question actually mailed any item referred to. It is
12 sufficient if you find that a defendant caused the mailing
13 by others -- and this does not require that the defendant
14 himself specifically authorized others to do the mailing or
15 specifically intended that the mails be used. Further, the
16 mailed matter need not disclose on its face a fraudulent
17 representation, an intent to defraud, or that it was mailed
18 in furtherance of a scheme to defraud. It may appear wholly
19 innocent. But it is necessary that the evidence establish
20 beyond a reasonable doubt that the matter in question was
21 willfully caused to be mailed -- as I have defined that for
22 you -- by the defendant you are considering to help carry
23 out the execution of the scheme to defraud alleged in the
24 indictment with respect to the particular count you may be
25 considering.

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2 The government must also establish beyond
3 a reasonable doubt that the particular mailing charged
4 in each of these four counts occurred during the existence
5 of the alleged scheme charged in the count and in its
6 furtherance.

7 If the scheme had entirely ended prior to
8 the mailing or in no way depended upon the mailing
9 to effect its fraudulent purpose, then the jurisdictional
10 element has not been supplied.

11 Turning next to the wire fraud counts,
12 that is, counts 3 and 4, charged against the defendant
13 Gardner, and counts 8, 9, 11 and 12 charged against
14 both Gardner and Guthrie, to sustain its charge that a
15 defendant is guilty of the wire fraud counts, the
16 government has to prove, in addition to the two common
17 essential elements I have previously mentioned as to
18 all of the first 12 counts, that for the purpose of
19 executing the fraudulent scheme or artifice the defendant
20 caused the transmission of sounds and signals by wire
21 communication in interstate or foreign commerce or caused
22 such use of interstate or foreign wire facilities by
23 another person.

24 I instruct you that interstate or foreign
25 telephone calls, telegrams, Telexes and cables con-

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2 stitute the use of wire communication within the meaning
3 of the statute.

4 Here counts 3 and 4 relate to alleged phone
5 calls between Gardner in New York and Ross Allen in
6 Ontario, Canada. Count 8 relates to an alleged
7 cable from Vigevani in Switzerland to the Bank of New
8 York in New York. Counts 9, 11 and 12 relate to
9 alleged telephone calls between Gardner and Guthrie
10 in New York and Myrtle Rupe in Oklahoma City.

11 As with the mails, if you find beyond a
12 reasonable doubt that a defendant caused interstate
13 telephone calls to be made or telegrams to be sent in
14 furtherance of a scheme to defraud, the evidence
15 need not establish that that defendant himself directly
16 participated in any telephone conversation or himself
17 sent any telegram or cable or even had specific knowledge
18 of the wire communication. It is sufficient if you
19 find that the defendant caused such communication
20 directly or indirectly. Under the wire fraud statute
21 there is no requirement that the accused know that the
22 instrumentalities of interstate communication are used
23 or that he foresee that such instrumentalities may be
24 used.

25 The remaining two of the first 12 counts

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2 are counts 1 and 10, the so-called travel fraud counts.
3 Let's consider first count 10, charged against both
4 Gardner and Guthrie.

5 In addition to the first two elements
6 common to all the counts, to establish that either de-
7 fendant is guilty of the offense set forth in count
8 10, the government must prove beyond a reasonable doubt
9 that that defendant, for the purpose of executing a
10 scheme to defraud a person of \$5000 or more, induced
11 that person to travel in interstate commerce or caused
12 soemone else to induce such travel.

13 Now, to induce simply means to cause a per-
14 son to do something, to persuade, or to influence, or
15 to stimulate action on the part of another person.
16 There is no requirement under the travel fraud statute
17 that the accused specifically know, foresee or intend
18 that a person would be induced to travel in inter-
19 state commerce. It is enough if you find that the
20 defendant knowingly participated in a scheme which
21 by its nature involved interstate travel and that
22 such travel actually did occur.

23 In this indictment, count 10 relates to
24 alleged travel by Myrtle Rupe from Oklahoma City to
25 New York which the government charges was directly in-

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2 duced by Gardner pursuant to a scheme in which Guthrie
3 was his co-schemer and in which Mrs. Rupe was de-
4 frauded of \$14,000.

5 Count 1 of the indictment, which is charged
6 only against the defendant Gardner, charges the transpor-
7 tation of a \$25,000 certified check by Gardner from
8 Niagara Falls, Canada, to New York, New York. This
9 count differs slightly from the 11 other so-called fraud
10 counts charged in the indictment because the offense
11 alleged in count 1 is encompassed by a different sub-
12 paragraph of Section 2314 of Title 18. That is the
13 statute which I have called the travel fraud statute.

14 And this provision reads in pertinent part
15 as follows:

16 "Whoever transports in interstate or foreign
17 commerce any securities or money of a value of
18 \$5000 or more, knowing the same to have been taken by
19 fraud," is guilty of a crime.

20 Under this provision of the law as it
21 applies to the facts of this case, in order to find
22 the defendant Gardner guilty on count 1 the government
23 must prove beyond a reasonable doubt, first, that the
24 security or money was taken by fraud, namely, pursuant
25 to a scheme or artifice to defraud which existed as

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2 alleged in the indictment.

3 Second, that the defendant you are con-
4 sidering participated in such a scheme knowingly,
5 wilfully and with intent to defraud, as I have defined
6 those terms to you; and,

7 Third, that the security or money was
8 transported by the defendant or was caused to be
9 transported by him in interstate or foreign commerce and
10 was of a value of \$5000 or more.

11 In this regard, I instruct you that a check
12 is a security within the meaning of this statute.

13 I instruct you that it does not matter if
14 a specific transaction is alleged in the indictment
15 to have occurred on or about a certain date and the
16 testimony indicates that in fact it was on another date.
17 The law only requires a substantial similarity between
18 the dates alleged in the indictment and the dates
19 established by the testimony.

20 Nor is it required that the government prove
21 that the alleged schemes to defraud started and ended
22 on the dates alleged in the indictment. It is
23 sufficient if you find that in fact an alleged scheme
24 to defraud existed at some time within that period.

25 Now, count 13 of the indictment charges

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2 the defendant Gardner with having violated or with
3 having aided and abetted Susan Braunig to violate
4 Title 18, United States Code, Section 1342, which is
5 commonly called the fictitious names statute.

6 Let me just tell you something about 1342
7 and then give you a comment and give you a brief
8 word on aiding and abetting.

9 1342 reads in pertinent part:

10 "Whoever for the purpose of conducting,
11 promoting or carrying on by means of the Postal
12 Service, any scheme or device mentioned in Section 1341
13 of this title (that is the mail fraud statute) or any
14 other unlawful business, uses or assumes, or requests
15 to be addressed by, any fictitious, false or assumed
16 title, name. . .or names other than his own proper
17 name (commits a crime)."

18 Count 13 charges, and I am summarizing
19 it for you, that for the purpose of executing the
20 scheme set forth in the indictment by means of the
21 Postal Service and of defrauding certain stores, banks
22 and commerce enterprises, the defendants Gardner and
23 Braunig used assumed, false and fictitious names and
24 titles. The particulars of this charge are set forth
25 in the indictment.

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2 In order to find the defendant Gardner guilty
3 of the crime charged in count 13, you must find that
4 the government has proven the following two essential
5 elements beyond a reasonable doubt:

6 First, that during the period of time alleged
7 in the indictment the defendant Gardner used or aided
8 and abetted Miss Braunig in the use of any of the
9 names and titles specified in the instruction and in
10 count 13, such as S. Michael Gardner, Mrs. Susan M.
11 Gardner and S. M. Gardner, and that these names and
12 titles were not his or her own proper name or title
13 but were false, fictitious or assumed.

14 Second, that the defendant Gardner used
15 or aided and abetted Miss Braunig in the use of one
16 or more of these names or titles for the purpose of
17 conducting, promoting or carrying on by use of the mails
18 any mail fraud scheme or any other unlawful business
19 set forth in the indictment.

20 For example, the government charges that
21 Miss Braunig with Gardner's help falsely posed as Gardn-
22 ner's secretary, assistant and wife and that, using
23 the name of Mrs. Gardner, she was able to give an
24 appearance of substance and respectability that enabled
25 her to open numerous credit accounts on which she there-

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2 after defaulted.

3 The use of an assumed or fictitious name
4 or title by an individual is not a crime in itself.
5 It may become criminal to use an assumed name or title
6 only if in using that name it is done for a fraudulent
7 purpose. Such use or holding out of an assumed name
8 becomes a crime in terms of the statute we are con-
9 sidering when it is done for the purpose of carrying
10 out by use of the mails a scheme to defraud or other
11 unlawful business.

12 Since the only unlawful businesses charged
13 in this indictment are the various schemes to defraud
14 set out in the introduction in the various counts, you
15 must find beyond a reasonable doubt all the elements
16 of one or more of the schemes charged in counts 1 through
17 12 before you can make a judgment on count 13. Then,
18 in addition, you must find beyond a reasonable doubt
19 each of the two further elements of the crimes as I have
20 just described them to you before you can convict the
21 defendant Gardner of count 13.

22 In this regard, I charge you that merely
23 being in debt or owing money in the absence of any
24 fraudulent scheme or purpose is not a crime and is not
25 what the defendant Gardner is charged with in count

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2 13 of this indictment.

3 I have mentioned that each of the defend-
4 ants is charged with aiding and abetting certain of the
5 other defendants in the commission of the crimes with
6 which each of the defendants is charged.

7 The aiding and abetting statute passed by
8 the Congress provides as follows:

9 "Whoever commits an offence against the
10 United States or aids or abets or counsels, commands
11 or induces or procures its commission, is punishable as
12 a principal."

13 Under this statute it is not necessary for
14 the government to show that a defendant himself physically
15 committed the crime with which he is charged in order
16 for you to find the defendant guilty. A person who
17 aids or abets another person to commit an offense is
18 just as guilty of that offense as if he committed it
19 himself. Accordingly, you may find either defen-
20 ant guilty of any of the offenses with which he is
21 charged if you find beyond a reasonable doubt with re-
22 spect to the particular count and defendant you are
23 considering that the government has proved that another
24 person actually committed the offense with which the
25 defendant is charged, and that the defendant aided or

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2 abetted that person in committing that offense.

3 As you can see from the language of the
4 law, the first requirement is that you find that another
5 person has committed a crime against the United States.
6 Obviously one cannot be held responsible for criminal
7 acts of another if no crime was committed by the other
8 person in the first place, but if you do find that a
9 crime was committed, then you must consider whether the
10 defendant you are considering aided and abetted the
11 commission of a crime.

12 In order to aid or abet another person to
13 commit a crime, it is necessary that the accused person
14 wilfully and knowingly associated himself in some way
15 with the crime charged and that he wilfully and knowingly
16 did seek by some act to help make the crime succeed.

17 I have already explained to you the meaning
18 of the words "wilfully and knowingly." Please remem-
19 ber that the mere presence of a defendant where a crime
20 is being committed, even coupled with knowledge by the
21 defendant that a crime is being committed, or the
22 mere negative acquiescence by a defendant in the
23 criminal conduct of other people even with guilty knowl-
24 edge is not sufficient to establish aiding and abetting.
25 An aider and abettor must have some interest in the

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2 criminal venture.

3 To determine whether a defendant aided or
4 abetted the commission of the offense with which
5 he is charged in the indictment, ask yourself these
6 questions: Did he participate in the crime charged
7 as something he wished to bring about? Did he
8 associate himself with the criminal venture knowingly
9 and wilfully? Did he seek by his action to make the
10 criminal venture succeed? If he did, then he is
11 an aider and abettor and therefore guilty of the
12 offense you have found to have been committed; and if
13 he didn't, then he is not guilty of the offense you
14 are considering.

15 Now, this completes my instructions to you
16 with respect to the elements which you must find that
17 the government has proved beyond a reasonable doubt
18 before you may convict either defendant on any of the
19 counts with which he is charged.

20 I remind you that as to any one count, if
21 you find that the government has not proved each of
22 the elements I have described beyond a reasonable doubt
23 as to the defendant you are considering, then it is your
24 duty to acquit that defendant as to that count.

25 On the other hand, if you find that with

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2 respect to any count the government has proved each
3 of the required elements beyond a reasonable doubt with
4 respect to the defendant you are considering, then it
5 is your duty to convict that defendant as to the crime
6 charged in that count.

7 Now, I have described the charges contained
8 in each of the 13 counts in the indictment against the
9 defendant Gardner and the six counts in the indictment
10 against the defendant Guthrie, and I have outlined
11 the essential elements of those counts. I ask you to
12 note that a separate crime or offense is charged in
13 each count of the indictment. Each charge against
14 each defendant and the evidence pertaining to it should
15 be considered separately. The fact that you find
16 a defendant guilty or not guilty as to one of the offenses
17 charged should not control your verdict as to the other
18 offenses charged against the same defendant.

19 Likewise, the fact that you find one de-
20 fendant guilty or not guilty as to any particular charge
21 should not control your verdict as to the other defend-
22 ant.

23 Also, you are not to consider or in any
24 way speculate about the sentence which a defendant may
25 receive if found guilty. It is the function of the

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2 jury to deliberate and determine whether a defendant
3 is guilty or not guilty on the basis of the evidence
4 and the instructions of the Court, and it is the function
5 of the judge to determine the disposition of the
6 defendant's case thereafter.

7 Well, the most important part of the case
8 is the part which you now, as jurors are about to play
9 because it is you who will have to decide whether the
10 defendants Gardner and Guthrie are guilty or not guilty
11 of the counts charged. I know that you will try
12 the issues that have been presented to you according
13 to the oath which you have taken as jurors, and if you
14 remember, in that oath you promised that you would well
15 and truly try the issues joined in this case and a true
16 verdict render. If you follow that oath and try the
17 issues without confusing your thinking with emotions,
18 you will arrive at a just verdict.

19 As you deliberate, please be careful to
20 listen to the opinion of other jurors as well as to
21 ask for an opportunity to express your own view.
22 No one juror holds the center of the stage in the jury
23 room; no one juror controls or monopolizes deliberations.
24 You must all express your views and exchange views.
25 If you become convinced that your original view was

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2 wrong with respect to any matter, don't be afraid to
3 change your vote because of pride in your original opinion
4 or in reaction to the stubbornness of another person.

5 On the other hand, do not surrender your
6 honest belief solely because of the opinion of your
7 fellow jurors or because you are outnumbered.

8 You understand that in a criminal case
9 in this court your verdict on each count as to each
10 defendant charged must be unanimous, that is, it must
11 be joined in by each and every one of you. The form
12 of the verdict as to each defendant will be either
13 guilty or not guilty on each count of the indictment
14 with which each defendant is charged.

15 If you wish, if you arrive at a verdict
16 of either guilty or not guilty on some counts although
17 not all counts, you may send in a note indicating that
18 and we will take your verdict accordingly.

19 During your deliberations, you may send
20 for any exhibits in evidence that you wish to see. You
21 may request that any testimony be read back to you or
22 that any tapes in evidence be replayed. You may re-
23 quest any portion of this charge to be read back to you.
24 You will receive a copy of the indictment to be taken
25 into the jury room. Remember that it is not evidence.

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2 All of your requests must be in writing.

3 Finally, you are instructed that you must
4 not reveal the standing of the jurors at any time
5 during your deliberations, that is, you are not to
6 indicate the split of any vote on any count for any
7 verdict to anyone, including the court.

8 Now, Madam Forelady, lead the jury out for
9 a few minutes. I have to discuss a couple of matters
10 with the lawyers. We will call you right back in.

11 Don't talk about the case or start deliberat-
12 ing yet.

13 (The jury left the courtroom.)
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